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Supreme Court, U.S.
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No. 99-1574

IN THE

Supreme Court of the United States

LOCAL 1199J,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.

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QUESTION PRESENTED

Should this Court grant certiorari to consider whether the Court of Appeals for the Third Circuit correctly held that former hospital and healthcare service provider, United Healthcare System, Inc. ("United"), was not an "employer" subject to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN Act") after it filed for bankruptcy because by the time it filed for bankruptcy it had ceased to operate a business enterprise in the normal commercial sense?

STATEMENT PURSUANT TO SUP. CT. R. 29.6

The parties to the proceeding before the Court of Appeals for the Third Circuit were: (1) the Official Committee of Unsecured Creditors of United Healthcare System, Inc. ("Committee"); (ii) Local 1199J, Local 1199J Pension Fund and Local 1199J Benefit Fund ("Local 1199J" or "Petitioner"); (iii) JNESO District Council 1, International Union of Operating Engineers, AFL-CIO ("JNESO"); and (iv) United.

In connection with the disclosure requirements of Sup. Ct. R. 29.6, the Committee is not a corporation because it was formed by the Office of the United States Trustee pursuant to 11 U.S.C. § 1102(a).

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STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The following are in addition to the statutory provisions set forth in the Petition:

1. The WARN Act: **29 U.S.C. § 2104. Administration and enforcement of requirements**.

Appendix A annexed hereto contains 29 U.S.C. § 2104.

2. Federal Regulations on WARN Act: **20 C.F.R. § 639.3(a)(1)(1989)**.

Appendix B annexed hereto contains 20 C.F.R. § 639.3(a)(1).

3. Department of Labor's Analysis of Final Regulations on WARN Act and Comments: **54 Fed. Reg. 16042, 16044 to 16045**.

Appendix C annexed hereto contains the relevant portions of the Department of Labor's Analysis and Comments.

4. New Jersey Statute: **N.J.S.A. 26:2H-7. Certificate of need; construction or expansion of health care facility or institution of health care service; applicability; waiver**.

Appendix D annexed hereto contains N.J.S.A. 26:2H-7.

STATEMENT OF THE CASE

A. Introduction

The WARN Act requires an "employer" with one hundred or more full-time employees to notify employees at least sixty days in advance of an intended plant closing or mass layoff. 29 U.S.C. § 2102(a). Employees who do not receive the requisite notice are, in general, entitled to "back pay" for the 60-day period. 29 U.S.C. § 2104(a). The WARN Act only applies to an "employer," which is defined as "any *business enterprise* that employs . . . 100 or more employees. . . ." 29 U.S.C. § 2101(a) (emphasis added). The Department of Labor ("DOL")'s regulations and comments on the WARN Act provide that an entity is an "employer" if it operates as a "business enterprise" in the "normal commercial sense." 20 C.F.R. § 639.3(a)(1)(ii); 54 Fed. Reg. 16042, 16045 (1989).

As held by the Third Circuit, United was not subject to the WARN Act post-bankruptcy because it was not an "employer" operating a "business enterprise" in the "normal commercial sense."

B. Background

Before its bankruptcy, United had operated a full service hospital in the City of Newark, New Jersey, and also had operated certain clinic facilities in Newark and other locations in the State of New Jersey.

On February 18, 1997, one day before its bankruptcy, United agreed to sell its goodwill, i.e., its business, to St. Barnabas and requested New Jersey's Commissioner of

Health to issue United a certificate of need permitting its closure and to issue St. Barnabas a certificate of need to conduct United's former business. That same day, February 18, 1997, the Commissioner of Health granted both of United's requests, effectively terminating its hospital operations, and licensing St. Barnabas to carry on those operations. The following day, February 19, 1997 (the "Filing Date"), United filed a petition for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"), 11 U.S.C. § 101, *et seq*. Within 48 hours after bankruptcy, pursuant to the Commissioner of Health's actions, United had discharged or transferred all of its patients to home or other healthcare facilities.

C. The Committee's Motion

Believing it was an "employer" subject to the WARN Act, United provided a notice to its 1,300 employees on the same day it filed for bankruptcy, advising the employees that they would be terminated effective sixty (60) days from the Filing Date ("WARN Notice"). In this WARN Notice, United also asked the employees to continue to report to work during this 60-day period.

On March 4, 1997, the Committee filed an emergent motion with the Bankruptcy Court, seeking an order directing United to terminate all employees immediately except those necessary to protect United's estate and ready United for a liquidation sale. The Committee argued that United was not an "employer" subject to the WARN Act. Further, the Committee observed that the total expense of United's continued employment of all its 1,300 employees post-bankruptcy for the 60-day WARN period was approximately $7.2 million, which threatened to dissipate all the currently

marshaled assets of United to the detriment of its creditors (the "Committee's Motion").

On March 6, 1997, in response to the Committee's Motion, United agreed to furlough all but 100 of its employees advising them that the employees were no longer to report to work. United also informed the employees that their right to receive paychecks for the remaining portion of the 60-day WARN period for which they would no longer report to work would be subject to further order of the Bankruptcy Court. The Bankruptcy Court directed the parties to conduct limited discovery and scheduled a plenary hearing on March 21, 1997 to determine the merits of the Committee's Motion. At the March 21, 1997 hearing, the Bankruptcy Court heard oral testimony and accepted other evidence from the Committee and United concerning the propriety of the WARN Notice.

D. The Bankruptcy Court's Decision

On March 26, 1997, the Bankruptcy Court filed its opinion and order. Despite its finding of fact that "for all intents and purposes United ended as an operating hospital" three (3) days prior to its bankruptcy, and that after bankruptcy, United's employees were solely engaged in readying United's assets for a liquidation sale, the Bankruptcy Court held that United was an "employer" subject to the WARN Act.[1] The Committee appealed the opinion and order of the Bankruptcy Court.

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1. The Bankruptcy Court also held that: (1) the "faltering company" and "unforeseeable business circumstances" exceptions to the WARN Act did not apply to United; and (2) the employees' "back pay" required under the WARN Act was a claim entitled to

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E. The District Court's Decision

On November 6, 1998, the District Court entered an order (the "District Court Order") affirming the Bankruptcy Court. In the District Court Order, the District Court held that United was an "employer" subject to the WARN Act because its employees reported to or were required to report to work for 16 days after the Filing Date.[2] (District Court Order, Petition, at 23a) The District Court did not disturb any of the Bankruptcy Court's findings of fact. The Committee appealed the District Court Order.

F. The Third Circuit's Decision

The Third Circuit addressed only the threshold question of whether, on the unchallenged factual record, the Bankruptcy Court and District Court correctly concluded that United was an "employer" subject to the WARN Act and required to provide the WARN Notice after it filed for bankruptcy. Because none of the parties disputed the

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an administrative first priority expense of United's estate pursuant to § 503 and § 507 of the Bankruptcy Code. Because the Third Circuit held that United was not subject to the WARN Act, the Third Circuit did not reach the exceptions to the WARN Act or the issue of whether the "back pay" claims were entitled to priority status either on a pre-petition or a post-petition basis. *See* Third Circuit Opinion, attached as Appendix A to Petition, at 11a, n.7.

2. The District Court also held that: (1) the "faltering company" and the "unforeseeable business circumstances" exceptions did not apply; and (2) the actual necessary costs and expenses of preserving the estate, including wages for services rendered following the bankruptcy filing, are entitled to classification as first priority administrative claims.

accuracy of the Bankruptcy Court's findings of fact, the Third Circuit exercised "plenary review."

Reviewing the language of the WARN Act, the DOL's regulations and comments, and relevant case law, the Third Circuit held that whether a bankrupt entity is an "employer" subject to the WARN Act depends on the nature and extent of the entity's business and commercial activities while in bankruptcy.

The Third Circuit ruled that, after bankruptcy, United was not an "employer" subject to the WARN Act because United did not operate a "business enterprise," *see* 29 U.S.C. § 2101(a)(1), in the normal commercial sense as a going concern after bankruptcy. Rather, United functioned solely as an entity liquidating its assets. The Third Circuit supported its conclusion with the following uncontroverted facts:

> On February 18, 1997, United Healthcare surrendered its certificates of need; on February 19, it filed a voluntary bankruptcy plan under which it would liquidate its assets and cease to exist; and, no later than February 21, United Healthcare had discharged or transferred all of its patients and was no longer admitting new patients. Significantly, after February 19, but in any event no later than February 21, its employees were no longer engaged in their regular duties but instead were performing tasks solely designed to prepare United Healthcare for liquidation.

(Third Circuit Opinion, Petition, at 18a).

Because the Third Circuit held that after its bankruptcy United was not an "employer" subject to the WARN Act, the Third Circuit also concluded that United was not subject to the WARN Act's notification requirements when it furloughed its employees.[3]

G. Objections To Petitioner's Questions Presented

On March 28, 2000, Local 1199J filed its Petition for Certiorari in this Court. The statement in Petitioner's first Question Presented that United employed 1,300 employees for sixteen (16) days after filing its bankruptcy petition to "care for over 160 patients" is inaccurate. The Bankruptcy Court found and the Third Circuit concurred that United did not operate as a hospital after it filed for bankruptcy on February 19, 1997. The Bankruptcy Court found:

> . . . [B]y the Board meeting of February 16, 1997 . . . for all intents and purposes United ended as an operating hospital.

(Bankruptcy Court Opinion, attached as Appendix A to JNESO's Brief In Support Of Petition ("JNESO's Brief"), at 12a-13a)).

> Within 48 hours after the filing of the bankruptcy, all of the debtor's patients had been discharged either to home or transferred to other healthcare facilities. Nonetheless, debtor's 1300 employees continued to work at the hospital on a daily basis

3. As a result, United's furloughed employees cannot assert a WARN Act claim against United for "back-pay" based on that portion of the 60-day period for which they did not report to work. (The furloughed employees have already been paid for all days for which they reported to work).

> after the Chapter 11 petition was filed. *The employees were engaged in cleaning, the taking of inventory of debtor's supplies, and the readying of debtor's assets for a liquidation sale.*

(Bankruptcy Court Opinion, JNESO's Brief, at 2a-3a (emphasis supplied)).

The Third Circuit concurred:

> Based upon our review of the Bankruptcy Court's findings of fact, we find that United Healthcare, as the fiduciary in bankruptcy proceedings, was operating not as a "business operating as a going concern," but rather as a business liquidating its affairs. On February 18, 1997, United Healthcare surrendered its certificates of need; on February 19, it filed a voluntary bankruptcy plan under which it would liquidate its assets and cease to exist; and no later than February 21, its employees were no longer engaged in their regular duties but instead were performing tasks solely designed to prepare United Healthcare for liquidation.

(Third Circuit Opinion, Petition, at 18a). (*See also* Third Circuit Opinion, Petition, at 5a and 18a (citing N.J.S.A. 26:2H-7) and Appendix D annexed hereto (New Jersey law requiring health care facilities to maintain certificates of need issued by Department of Health in order to operate)).

The statement in Petitioner's fourth Question Presented that the Third Circuit created an exception to the WARN Act is wrong. The Third Circuit found no exception but rather concluded that the WARN Act did not apply to United because it did not meet the threshold requirement of

being an "employer" under the WARN Act based on the unchallenged factual record that United did not operate a "business enterprise" after it filed for bankruptcy. *See* 29 U.S.C. § 2101(a)(1).

REASONS FOR DENYING THE WRIT

I. PURSUANT TO SUP. CT. R. 14.4, CERTIORARI SHOULD BE DENIED BECAUSE LOCAL 1199J DOES NOT STATE ANY COMPELLING REASON WHY CERTIORARI SHOULD BE GRANTED.

Sup. Ct. R. 10 states that "a writ of certiorari will be granted only for compelling reasons." Further, Sup. Ct. R. 14.4 provides that the failure "to present with accuracy, brevity, and clarity . . . points requiring consideration is sufficient reason for the Court to deny a petition."

Here, Local 1199J never explains why this case should be granted certiorari, nor does it address any of the "compelling" reasons described in Sup. Ct. R. 10. Instead, the Petitioner simply reargues the merits of the Third Circuit's decision.[4] Moreover, the Petitioner argues the "faltering business" and "unforeseen business circumstances" exceptions to the WARN Act, which the Third Circuit declined to address.[5] For this reason alone, the Petition should be denied.

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4. JNESO, which has filed a Brief In Support of Petitioner, similarly fails to provide any reasons why certiorari should be granted but simply reargues the merits of the Third Circuit's decision. (JNESO's Brief, at 6-11).

5. (*See* Third Circuit Opinion, Petition, at 11a, n.7) (Third Circuit declines to consider whether exceptions to WARN Act apply).

II. CERTIORARI SHOULD BE DENIED BECAUSE NONE OF THE REASONS SET FORTH IN SUP. CT. R. 10 ARE PRESENT

A. The Third Circuit's Decision Does Not Conflict With Any Other Decisions Of The Circuit Court Of Appeals And Is Consistent With All Decisions Of The Circuit Courts of Appeal Addressing the WARN Act's Qualification of An "Employer"

The Third Circuit decided that United could not qualify as an "employer" subject to the WARN Act because it was not a "business enterprise," operating as a going concern in the normal commercial sense. *See* 29 U.S.C. § 2101(a)(1). Rather, post-bankruptcy, United was an entity solely engaged in the liquidation of its assets. This conclusion is consistent with the decision of the Court of Appeals for the Eighth Circuit in *Adams v. Erwin Weller Co.*, 87 F.3d 269 (8th Cir. 1996), and the decision of the Court of Appeals for the Ninth Circuit in *Chauffers, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp.*, 66 F.3d 241 (9th Cir. 1995). Each addressed the issue of whether a secured creditor preserving its collateral could be construed to be an "employer" under the WARN Act. Both concluded that unless a secured creditor operated its debtor's business as a business enterprise in the normal commercial sense; to wit, as a going concern, the secured creditor would not be an "employer" subject to the WARN Act. Both circuits interpreted the term "business enterprise," consistent with the DOL's regulations[6] and comments,[7] to mean the operation

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6. 20 C.F.R. § 639.3(a)(1)(ii) provides in pertinent part:

> [T]he term "employer" includes public and quasi-public *entities which engage in business* (i.e., take part in a

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of a business as a going concern as opposed to a liquidation for the benefit of a creditor or creditors. *See Weslock*, 66 F.3d at 244 (holding a secured creditor could be an employer if it "operates the debtor's asset as a 'business enterprise' in the 'normal commercial sense.' ") (quoting 54 Fed. Reg. 16045) and *Adams*, 87 F.3d at 272-73 (WARN Act not triggered when secured creditor repossessed borrower's plant solely to conduct a liquidation and never reopened plant for business nor operated plant as a going concern).

Consistent with these decisions, as well as with the DOL's regulations and comments, the Third Circuit stated:

(Cont'd)

> commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments). . . .

(Emphasis supplied).

7. 54 Fed. Reg. 16045 provides in pertinent part:

> [T]he DOL does not think it appropriate to [exclude all bankrupt companies from the definition of "employer"]. Further, the DOL agrees that a *fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors* does not succeed to the notice obligations of the former employer because the fiduciary *is not operating a "business enterprise" in the normal commercial sense*. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.

(Emphasis supplied).

> [W]e believe that whether a bankrupt entity is an "employer" under the WARN Act depends on the nature and extent of the entity's business and commercial activities while in bankruptcy, and not merely on whether the entity's employees continue to work "on a daily basis." The more closely the entity's activities resemble those of a business operating as a going concern, the more likely it is that the entity is an "employer;" the more closely the activities resemble those of a business winding up its affairs, the more likely it is the entity is not subject to the WARN Act.

(Third Circuit Opinion, Petition, at 18a).

Thus, the Third Circuit's analysis of an "employer" subject to the WARN Act's notification requirements does not conflict with, but is entirely consistent with, decisions rendered by other courts of appeal.[8]

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8. Additionally, the Third Circuit's analysis is consistent with *In re Hanlin Group, Inc.*, 176 B.R. 329 (Bankr. D.N.J. 1995), which was relied upon by the Bankruptcy Court below. In *Hanlin*, the court held that the debtor was subject to the WARN Act because it "kept the plant in operation for at least one month after the petition was filed, and continued to operate the business as a whole. . . ." 176 B.R. at 332. This also undercuts Local 1199J's assertion that the Third Circuit created a new WARN Act "exception" for Chapter 11 debtors (Petition, at 13) and JNESO's statement that the "issue on appeal is whether the protections of the WARN Act can simply be evaded by filing a petition for bankruptcy. . . ." (JNESO's Brief, at 6). To the contrary, the Third Circuit acknowledged that a Chapter 11 debtor may be subject to the WARN Act, however, the determination turns on the "nature and extent of the entity's business and commercial activities while in bankruptcy, . . ."

B. None Of The Other Reasons Listed In Sup. Ct. R. 10 Exist In This Case.

The Third Circuit's decision does not conflict with a decision by a state court of last resort. (Sup. Ct. R. 10(a)).

The Third Circuit has not departed from the accepted and usual course of proceedings. (Sup. Ct. R. 10(a)). To the contrary, the Third Circuit simply disagreed with the lower courts' legal conclusions.

The Third Circuit's decision does not conflict with a decision of this Court. (Sup. Ct. R. 10(c)).

The Third Circuit has not decided an important federal question that should be settled by this Court. (Sup. Ct. R. 10(c); *see Braxton v. U.S.*, 500 U.S. 342, 347 (1991) (principal purpose for which Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeal and state courts concerning meaning of provisions of federal law)). None of the Circuit Courts of Appeal have had difficulty in applying the WARN Act's criterion to determine whether a litigant is an "employer" subject to the WARN Act. Further, each of the Circuit Courts of Appeal have reached consistent decisions with respect to those persons who qualify as "employers" subject to the WARN Act. Thus, the question of who is an "employer" under the WARN Act is not an important federal question that should be settled by this Court. Moreover, the Court's "supervisory power" should not be exercised when the three Circuit Courts of Appeal that have considered the issue have reached similar conclusions.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE THIRD CIRCUIT CORRECTLY APPLIED THE APPROPRIATE LEGAL STANDARD TO THE UNCONTROVERTED FACTS.

The Third Circuit properly analyzed the issue of who is an "employer" under the WARN Act, and applied the appropriate legal standard to the uncontroverted facts. The Third Circuit analyzed whether United was an "employer" within the meaning of the WARN Act by: (a) reviewing the language of the statute itself; (b) considering agency regulations and comments because the statute's language did not address the issue directly; and (c) reviewing relevant case law on the subject. After performing these steps, the Third Circuit ruled, consistent with other courts that have considered the issue, that whether a bankrupt entity is an "employer" under the WARN Act depends on whether the entity's activities resemble those of a "business enterprise in the normal commercial sense;" to wit, a business operating as a going concern.

The Third Circuit concluded in this case, upon its bankruptcy filing United was not an "employer" subject to the WARN Act because United: (1) prior to bankruptcy, had surrendered its licenses to operate a hospital; (2) within 48 hours after bankruptcy, had discharged or transferred all its patients and did not admit new patients; (3) entered bankruptcy to liquidate its assets; and (4) continued the employment of its employees only to clean, conduct inventory, and ready its assets for liquidation sales.

This Court should not grant certiorari to consider an issue that was properly analyzed and ruled upon by the Third Circuit.

CONCLUSION

Local 1199J's Petition for Certiorari should be denied because: (1) Local 1199J fails to present a compelling reason why certiorari should be granted; (2) none of the reasons set forth in Sup. Ct. R. 10 are present; and (3) the Third Circuit's decision was correct and consistent with the decisions of the Eighth and Ninth Circuit Courts of Appeal addressing the question of who is an "employer" subject to the WARN Act.

Respectfully submitted,

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APPENDIX

APPENDIX A — 29 U.S.C. § 2104

29 U.S.C. § 2104. Administration and enforcement of requirements

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —

(A) back pay for each day of violation at a rate of compensation not less than the higher of:

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by:

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the

employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

Appendix A

(b) Exclusivity of remedies

The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

APPENDIX B — 20 C.F.R. § 639.3(a)(1)

20 C.F.R. § 639.3 Definitions

a. *Employer*. (1) The term "employer" means any business enterprise that employs:

(i) 100 or more employees, excluding part-time employees; or

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

APPENDIX C — 54 FED. REG. 16042, 16044 TO 16045

(4) Section 639.2 Definitions

(a) Section 639.3(a) Definition of "Employer"

This provision provides a definition of the term "employer". It repeats the statutory definition of the size threshold for coverage under WARN as an employer and specifies which workers are counted in making coverage determinations; it makes it clear that private nonprofit organizations, as well as for-profit entities, are covered; it discusses the status of independent contractors and subsidiaries as separate employers; and it clarifies that an employer is defined in terms of the overall corporate or business entity, not in terms of any particular plant.

In the preamble to the proposed regulations, DOL requested comments on whether agencies of State and local government which are independent and perform business activities should be covered. Several commenters opposed inclusion of these entities, arguing that the statutory definition of employer as a "business enterprise" is inapplicable to government agencies, that the tax payment test for notice to local governments is inapplicable to agencies of local government and that any definition would sweep too broadly and include school boards and similar entities. Other commenters supported inclusion as consistent with the intent of WARN to broadly protect workers against dislocation. Because of the use of the term "business enterprise", DOL concludes that regular Federal, State, and local government public agencies and services are outside the purview of WARN. For completeness, federally recognized Indian tribal governments have also been added

to the list of governments not covered by WARN. The legislative history is not helpful on the specific question of coverage of public and quasi-public business enterprises. DOL agrees that the underlying intent of WARN is worker protection. Given the nature and the language of the law, DOL concludes that the term "business enterprise" used in the statute includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise; supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments). Whether a particular public or quasi-public entity is covered will be determined by the functional test described above and by an organizational test, i.e., whether the entity is managed by a separately organized governing body with independent authority to manage its personnel and assets. It should be noted that DOL has not defined covered public enterprises in terms of the traditional/non-traditional governmental functions distinction that was rejected by the Supreme Court as unworkable in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1984). The test that has been adopted is intended to be a relatively precise one that will include such entities as regional transportation authorities and independent municipal utilities, but will exclude such organizations as school boards. Several commenters pointed out that the phrase in § 639.3(a)(1), defining additional workers who are counted in determining whether an employer meets the coverage threshold, "[w]orkers on temporary layoff who have a reasonable expectation of recall" needs further definition. Particularly, commenters from the construction industry pointed out that when construction crafts workers are laid off at the end of a project,

they expect to be reemployed within the construction industry, but not necessarily with the same employer. DOL agrees with the commenters that further definition of the phrase is appropriate and has added a definition. A worker is considered to have a "reasonable expectation of recall" if the worker "understands, either through notification or industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or a similar job." This definition, derived from case law under the National Labor Relations Act (NLRA), is intended to cover those situations in which, for a variety of reasons, workers are laid off with the understanding that they will be called back at a later date. The definition is intended to be applied in accordance with the case law developed under the NLRA.

Another commenter suggested that the regulations should define the status of workers who are on leave from their employers. DOL thinks that the same rules apply to these workers as apply to workers in layoff status, that is, whether workers on leave from an employer understand that their leave status constitutes a temporary interruption of their job and that they have rights upon the conclusion of their leave to return to the same or a substantially similar job with the employer. Language has been added in § 639.3(a)(1) to include workers on leave within the category of workers who may be counted for determining the coverage thresholds for the definition of employer.

Several commenters raised questions about the definition of "[i]ndependent contractors and subsidiaries" in § 639.3(a)(2). Some of these commenters suggested that the

definition should be simplified to treat subsidiaries as separate employers as long as they are "bona fide separate and distinct companies and hold themselves out to the public as such"; or to define as separate companies entities that have separate payroll functions. One commenter requested special treatment for the garment industry because of the peculiar relationship of jobbers and contractors within that industry. Another commenter suggested that the regulation also should recognize the doctrine of joint employer status, as that doctrine has been developed under the NLRA. A commenter suggested that the National Mediation Board should be recognized as the authority for determining whether companies covered by the Railway Labor Act (RLA) are separate. Another commenter stated that the rule on subsidiaries also should apply to operating divisions.

The intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The Department does not believe that there is any reason to attempt to create new law in this area especially for WARN purposes when relevant concepts of State an federal law adequately cover the issue. Thus, no change has been made in the definition. Similarly, the regulation is not intended to foreclose any application of existing law or to identify the source of legal authority for making determinations of whether related entities are separate. To the extent that existing law recognizes the joint employer doctrine or the

special situation of the garment industry, nothing in the regulation prevents application of that law. Nor does the regulation preclude recognition of the National Mediation Board as an authoritative decision maker for entities covered under the RLA. Neither does the regulation preclude treatment of operating divisions as separate entities if such divisions could be so defined under existing law.

A commenter suggested that the regulations be clarified to reflect that if a business loses a contract, it is not responsible for employment losses that occur if the successor contractor fails. DOL agrees with the comment, but believes that the proposition state is axiomatic in the WARN scheme; an employer is only responsible for giving notice to its employees for covered employment losses that occur as a result of its actions. The Department does not believe that any clarification of the regulations is needed.

A question has been raised whether temporary employees are to be counted when determining whether an employer is covered under WARN. The Department notes that there is no exception for temporary employees (or more accurately, for employees working on temporary projects or in temporary facilities) in the definition of employer in the law; the only category of workers not counted in determining coverage is part-time employees, as defined in the statute. In determining employer coverage, therefore, temporary employees are counted unless they are part-time employees. Of course, while an employer may be covered by virtue of employing a sufficient number of temporary — but not part-time — workers, the employer may be exempt from any requirement to give these employees notice if they are working in a

temporary facility, or on a temporary project or undertaking, as defined in § 4(a) of the Act and § 639.5(c) of these regulations.

The Federal Home Loan Bank Board (FHLBB) specifically commented on the application of WARN to its activities and those of the Federal Savings and Loan Insurance Corporation (FSLIC) in the current savings and loan (S&L) banking crisis. FHLBB argues that, because of its statutory mandate, it should not be considered an employer when it or the FSLIC closes a bank. The Department agrees that under the statutory scheme of the deposit insurance laws, neither the Board nor the FSLIC, which are exercising strictly governmental authority in ordering the closing, are to be considered as employers.

Another commenter suggested that "fiduciaries" in bankruptcy proceedings should be excluded from the definition of employer. Since adequate protections for fiduciaries are available through the bankruptcy courts, the Department does not think it appropriate to change the regulations to address this situation. Further, DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.

APPENDIX D-- N.J.S.A. 26:2H-7

26:2H-7. Certificate of need; construction or expansion of health care facility or institution of health care service; applicability; waiver

No health care facility shall be constructed or expanded, and no new health care service shall be instituted after the effective date of P.L.1971, c. 136 (C.26:2H-1 et seq.) except upon application for and receipt of a certificate of need as provided by P.L.1971, c. 136 (C.26:2H-1 et seq.). No agency of the State or of any county or municipal government shall approve any grant of funds for, or issue any license to, a health care facility which is constructed or expanded, or which institutes a new health care service, in violation of the provisions of P.L.1971, c. 136 (C.26:2H-1 et seq.).

Except as provided in *section* 19 of P.L.1992, c. 160 (C.26:2H-7a) *and section 16 of P.L.1998, c. 43 (C.26:24-7c)*, the provisions of this section shall apply to:

a. The initiation of any health care service as provided in section 2 of P.L.1971, c. 136 (C.26:2H-2);

b. The initiation by any person of a health care service which is the subject of a health planning regulation adopted by the Department of Health *and Senior Services;*

c. The purchase by any person of major moveable equipment whose total costs is over *$2* million;

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d. The expenditure by a licensed health care facility of over *$2* million for construction of a new health care facility; and

e. The construction of a facility by any person, whose total project cost exceeds *$2* million, if the facility-type is the subject of a health planning regulation adopted by the Department of Health *and Senior Services*.

The commissioner may periodically increase the monetary thresholds established in this section, by regulation, to reflect inflationary increases in the costs of health care equipment or construction.

For the purposes of this section, "health care service" shall include any service which is the subject of a health planning regulation adopted by the Department of Health *and Senior Services*, and "person" shall include a corporation, company, association, society, firm, partnership and joint stock company, as well as an individual.

A physician who initiates a health care service which is the subject of a health planning regulation or purchases major moveable equipment pursuant to subsection b. Or c. of this section, may apply to the commissioner for a waiver of the certificate of need requirement if: the equipment or health care service is such an

essential, fundamental and integral component of the physician's practice specialty, that the physician would be unable to practice his specialty according to the acceptable medical standards of that specialty without the health care service or equipment; the physician bills at least 75% of his total amount of charges in the practice specialty which uses the health care service or equipment; and the health care service or equipment is not otherwise available and accessible to patients, pursuant to standards established by the commissioner, by regulation. The commissioner shall make a determination about whether to grant or deny the waiver, within 120 days from the date the request for the waiver is received by the commissioner and shall so notify the physician who requested the waiver. If the request is denied, the commissioner shall include in that notification the reason for the denial. If the request is denied, the initiation of a health care service or the purchase of major moveable equipment shall be subject to the certificate of need requirements pursuant to this section.

A health maintenance organization which furnishes at least basic comprehensive care health services on a prepaid basis to enrollees either through providers employed by the health maintenance organization or through a medical group or groups which contract directly with the health maintenance organization, which initiates

a health care service, or constructs a health care facility pursuant to subsection a., b., d. or e. of this section, may apply to the commissioner for a waiver of the certificate of need requirement if: the initiation of the health care service or the construction is in the best interests of State health planning; and the health maintenance organization is in compliance with the provisions of P.L.1973, c. 337 (C.26:2J-I et seq.) and complies with the provisions of subsection d. of section 3 of P.L.1973, c. 337 (C.26:2J-3) regarding notification to the commissioner. The commissioner shall make a determination about whether to grant or deny the waiver within 45 days from the date the request for the waiver is received by the commissioner and shall so notify the health maintenance organization. If the request for a waiver is denied on the basis that the request would not be in the best interests of State health planning, the commissioner shall state in that notification the reason why the request would not be in the best interests of State health planning. If the request for a waiver is denied, the health maintenance organization's initiation of a health care service or construction project shall be subject to the certificate of need requirements pursuant to this section.

The requirement to obtain a certificate of need for major moveable equipment pursuant to subsection c. Of this section shall not apply if a contract to purchase that equipment was entered into prior to July 1, 1991.